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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 877

NATIONAL LEAD COMPANY,
Petitioner,
v.
FEDERAL TRADE COMMISSION,
Respondent.

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,
v.
FEDERAL TRADE COMMISSION,
Respondent.

THE EAGLE-PICHER COMPANY, *et al.*,
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.

CROSS PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Dated April 18, 1956.

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Petitioners pray that a writ of certiorari issue to review a decree of the United States Court of Appeals for the Seventh Circuit entered in the above entitled consolidated cases on January 5, 1956.*

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* Petitioners seek a review of only certain portions of that decree. They are opposing the petition for a writ of certiorari filed by the Solicitor General, on behalf of the Federal Trade Commission, on another phase of the case.

Opinion Below

The opinion of the Court of Appeals is reported in 227 F. 2d 825.

Jurisdiction

The decree of the Court of Appeals was entered on January 5, 1956. The time for filing this petition for a writ of certiorari was extended to April 19, 1956 by order signed by Mr. Justice Minton on April 3, 1956 (Appendix, *infra*, p. 23). The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Questions Presented

1. Whether a finding of conspiracy may be based solely on evidence of activities concerned with the formulation of an NRA Code, undertaken by members of an industry at the insistence of NRA officials.

2. Whether, in any event, there is substantial evidence, in the light of the whole record, to support the finding of conspiracy.

3. Whether, in the absence of any finding or evidence that purchasers of white lead in oil located in different price zones were in competition with each other, the Federal Trade Commission could properly determine that the differing prices paid by such purchasers constituted illegal price discriminations.[1]

Statutes Involved

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. Section 45, provides in part as follows:

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1. At the present time Eagle-Picher neither produces nor sells white lead in oil and therefore it does not seek to raise this question.

"(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * *

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, * * *. * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

The Administrative Procedure Act, 5 U. S. C. Section 1009, provides in part:

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be * * *; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of any agency hearing provided by statute: * * *. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Section 5 of the National Industrial Recovery Act, 48 Stat. 198, provided:

"While this title is in effect (or in the case of a license, while section 4(a) is in effect) and for sixty days thereafter, any code, agreement, or

> license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States."

Section 2 of the Clayton Act, as amended by the Act of June 19, 1936, commonly called the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. Section 13, provides in part:

> "(a) * * * it shall be unlawful for any person engaged in commerce, * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchaser sold or delivered: * * *."

Statement of the Case

The Federal Trade Commission charged and found that petitioners and certain other companies in 1933-1934 entered into a conspiracy to adopt zone methods of pricing and other terms and conditions of sale of lead pigments.[2]

2. The other companies involved were Anaconda Copper Mining Co., its subsidiary, International Smelting & Refining Co., and The Glidden Company. Glidden did not file a petition for review in the Court of Appeals and that Court dismissed the proceedings as to Anaconda and International (227 F. 2d at 828-829, 839-840). The

The Commission also found that the differing zone prices paid by customers located in different price zones, together with certain quantity differentials, constituted illegal price discriminations (R. 3750-51, 3761-67, 3787-96).

In January, 1953, the Commission entered an order to cease and desist enjoining further performance of the alleged conspiracy, prohibiting price discriminations, and enjoining individual (as distinguished from collusive) use of any zone method by the petitioners (R. 3799-3802).[3]

On review by the Court of Appeals, Seventh Circuit, the order of the Commission was modified, and, as modified, affirmed (227 F. 2d at 844). The Court of Appeals affirmed the order condemning the alleged conspiracy, but modified the price discrimination feature of the order insofar as zone prices for dry white lead were concerned. It set aside the paragraph of the order prohibiting individual employment of a zone method.

Petitioners are here seeking review of those portions of the decree which affirmed the Commission's order enjoining the alleged conspiracy and affirmed the price discrimination paragraph of the order insofar as it prohibited the use of zone prices in the sale of white lead in oil.

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three "lead pigments" here involved are: (1) white lead in oil, a semi-mixed paint sold to painters and paint contractors; (2) dry white lead, used by paint manufacturers in the manufacture of outside paints; and (3) lead oxides (red lead and litharge), principally used in the manufacture of storage battery plates.

3. The Commission also perpetually enjoined petitioner National Lead from acquiring the stock or assets of any competitor. This was set aside by the Court of Appeals (see 227 F. 2d at 837-839; Final Decree, p. 2-3) and no review of this portion of the decree is sought by the Commission.

The Issue of Conspiracy

The findings of conspiracy were based solely upon evidence of what occurred during NRA days when the members of the lead pigments industry were attempting to formulate a Code of fair competition.

The evidence on this issue is undisputed and is in large part documentary.

Following enactment of the National Industrial Recovery Act, petitioners and other members of the industry were reluctant to formulate any code, but, in an effort to cooperate with NRA, were willing to file a code dealing with minimum wages and maximum hours. This was deemed insufficient by NRA officials, who insisted that the industry members attempt to work out a code of trade practice (R. 1062-63, 1204; Resp. Ex. 50, R. 2840-43; Resp. Ex. 81, R. 2851).

Complying with this demand, petitioners and the other lead pigment manufacturers established, under the aegis of Lead Industries Association (a trade organization), several committees which were entrusted with the duty of attempting to draw up a code of trade practices covering the various products (white lead in oil, dry white lead and lead oxides). These committees met from time to time during the latter part of 1933 and early 1934. Their deliberations are set forth in minutes, correspondence and various tentative drafts of a Code of Trade Practices (see, e.g., Com. Exs. 501-504, 799-805, R. 2425-2700).

It is upon the evidence concerning these meetings that the Commission predicated its findings of conspiracy.

It is undisputed that in their deliberations, the committee members (representing petitioners and others) considered numerous trade practices, including zone methods of pricing, the agency method of selling white

lead in oil, and the use of certain other terms and conditions of sale (id.).

Zones and the agency method were not adopted in the Code, and the record establishes that no agreement could be reached upon these two practices (*infra*, pp. 8, 11). Certain terms and conditions of sale for dry white lead and lead oxides were adopted for code purposes only and finally became a part of Schedule A of the Code itself (Com. Ex. 809, R. 2730-35).

At the insistence of NRA officials, and over petitioners' objection, the Code (R. 2726) also contained an open price filing provision (Resp. Ex. 50, R. 2842-43).

The Code did not require adherence to the terms and conditions of sale set forth in Schedule A. It merely required petitioners and the other industry members to file terms of sale used by them which differed from those set forth in Schedule A (R. 2726).

Primarily because of their unwillingness to comply with the open price filing provision of the Code, the industry members, shortly after Presidential approval of the Code in May, 1934, requested and obtained an exemption from the requirement of price filing and the filing of terms of sale which differed from those provided for in the Code (Resp. Ex. 50, R. 2842-43; Resp. Exs. 6-8, R. 2792-93, 2800-03).

The Commission found that during the course of these NRA meetings petitioners and the other industry members conspired to adopt uniform zones, uniform prices, the agency method and other uniform terms and conditions of sale (R. 3750-51, 3761-67).

(a) *Price Zones*

There is no question about the fact that National Lead itself, shortly prior to approval of the Code, adopted zone methods for the sale of white lead in oil and oxides

(R. 1508-09; Resp. Ex. 159, R. 2968-69). The record indicates that prior to 1933 dry white lead had been sold on a delivered price zone method but National Lead individually changed the zone boundary for this product in June, 1934 (R. 1337-38, 3293, 3447; Resp. Ex. 159, R. 2965).

White lead in oil was sold on a multiple zone system involving approximately 12 zones (R. 3763) with a par or base zone and slightly higher differentials in the premium zones where the increased cost of shipping to National Lead equalled or exceeded the zone differential.[4]

Dry white lead was sold on a two-zone method, with the Rocky Mountains forming the barrier between the eastern par zone and the Western premium zone (R. 3764).

Oxides were sold on the basis of two different zone methods. In less than carload quantities there was a multiple zone method consisting of a par zone and four differential zones, while carload quantities were sold in two par zones and one differential zone (R. 3765-66).

There is no evidence of any agreement between National Lead and the other manufacturers on the use of zones; on the contrary, the record shows no agreement was reached (Com. Ex. 505, R. 2434).[5]

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4. National Lead had sold this product on a delivered price basis, with prices varying from zone to zone, as far back as 1910 (R. 1495). The former method involved delivery points rather than flat prices which prevailed throughout any particular zone at all points. The territorial boundaries of the zones, however, closely corresponded to the zone boundaries under the method which National Lead individually adopted in 1933 or 1934 (Resp. Ex. 147, R. 2953).

5. The minutes of one or two meetings contain some reference to the possible establishment of zones and at least one zone map was proposed for Code purposes. This map, however, depicted zones wholly different from those ultimately adopted by any of the respondents, and the minutes expressly state that no agreement was reached (Com. Ex. 513-E, not printed; Com. Ex. 505, R. 2434). Moreover, the testimony establishes that zones were dropped from the Code when the industry decided to abandon price reporting (R. 1316-17).

After approval of the Code, and after adoption by National Lead of the zone methods described, some of the other manufacturers began to sell on a delivered price basis, but the record indicates that the methods employed by the other manufacturers differed in significant respects from the zone methods used by National Lead (compare Com. Ex. 580, R. 2471—National Lead's zone map—with Com. Ex. 585, R. 2472; see also, Com. Ex. 836, R. 2737; R. 1317; Com. Ex. 662, R. 2613-16).

(b) *Prices*

Prices were not discussed at the NRA meetings. Indeed, the minutes reflect a determination to exclude prices from the field of Code discussion (Com. Ex. 504, R. 2433). No price-fixing provisions were inserted in the Code and, as we have seen, the industry members sought and obtained relief from the open price filing provisions insisted upon by NRA.[6] Prices were never filed with the Code authority and no price information was disseminated among members of the industry (R. 1082).

Lead pigments are standard products. Customarily the other manufacturers, prior and subsequent to 1933, sold dry white lead and oxides at approximately the same price as National Lead's, the largest manufacturer of lead pigments. In the white lead in oil field, however, where National Lead's "Dutch Boy" product was the quality leader, the other respondents after 1933 sold brands of white lead in oil at prices which were from 20¢ to 25¢

6. Commissioner Mason, in his dissenting opinion, observed (R. 3829):

> "* * * in my opinion the evidence indicates a healthy and skeptical attitude on the part of the lead pigment entrepreneurs who had no stomach for tying their hands in the competitive battle, no matter how much the NRA wanted them to."

per hundredweight lower than National Lead's price (R. 709; Com. Ex. 663, R. 2617-18; Com. Ex. 795-L to Z-13; Com. Ex. 656, R. 2542-43).[7] Admittedly, lead pigments were sold at a low margin of profit over the cost of the principal raw material, pig lead.[8]

The record also shows that on a number of occasions National Lead, as well as the other manufacturers, sold at off-list prices (Com. Exs. 772, 798, 754, 795, 845, 846, 847, 840, 831).[9] In 1939, 1940 and 1941, on 47 large Government contracts, petitioners and the other manufacturers submitted 207 widely differing secret bids (Resp. Exs. 306-308, R. 3174-82).

White lead in oil competed directly with ready-mixed paints which offered the user a vehicle ready for application. Dry white lead was sold in competition with titanium dioxide, lithopone and leaded zinc oxide, while the manufacturers of lead oxides were always faced with the

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7. The Commission attempted to minimize this price disparity by asserting that the resale prices of petitioners' dealers were identical (R. 3772). There was no proof of this. The price cards of petitioners, setting forth suggested resale prices, were usually identical but there was no evidence whatever that dealers actually sold at such suggested prices.

8. The Commission made the following curious finding (R. 3747): "* * * the price of lead pigments announced and maintained by National and Eagle-Picher as a consequence of their dominating positions had the effect of placing a ceiling on prices which their smaller competitors could charge *and of making profit margins sufficiently narrow to induce these competitors to sell at the highest prices they could get.*"

9. In the Court below, for example, the Commission conceded that, in the case of oxides, 40% of the listed sales by Glidden, 10% of Eagle-Picher's listed sales, and 25% of the listed sales by National Lead were at off-list prices (Brief of Commission before Court of Appeals, pp. 85-86). There was no proof that such off-list sales were made solely to large battery manufacturers, as stated by the Court below (227 F. 2d at 833).

threat that the battery manufacturers would process oxides for their own consumption (R. 625, 630, 764, 1313, 1557-58, 1757, 1918, 1945, 1951).

(c) *The Agency Method*

The Commission found that the NRA meetings resulted in an agreement among National Lead, Eagle-Picher and Anaconda to sell white lead in oil through dealer-agents for the purpose of controlling the "resale" price (R. 3761-62, 3767).

The undisputed evidence is that National Lead in late 1932, prior to the NRA discussions, experimented with the agency method of distributing white lead in oil and that during NRA it sought to have the agency method included in the Code (Com. Ex. 506, R. 2437-39; R. 3770). When it met serious opposition from the other industry members, however, the matter was given no further consideration (Com. Ex. 505, R. 2434). National Lead individually, however, began to employ its agency method on a nation-wide basis (Com. Ex. 599, R. 2507).

Anaconda independently established a different method (a consignment arrangement) as early as November, 1932, also prior to NRA days (Com. Ex. 836, R. 2737, R. 3771). This method, however, unlike National Lead's, did not make the consignee an agent of the manufacturer, nor did it fix the price at which the consignee was to sell the product (R. 3771).

Eagle-Picher was the only other respondent to employ a method similar to National Lead's (Com. Ex. 629, R. 2522).

Eagle-Picher abandoned the use of its consignment plan in 1942, while National Lead suspended the use of its method in January, 1944 (Com. Ex. 647, R. 2526; Com. Ex. 624, R. 2520).

(d) *Terms and Conditions of Sale*

(1) Container Differentials

The Commission found that the NRA meetings resulted in an agreement to sell lead pigments in containers at differentials of 25¢ per hundredweight between keg sizes of 12½, 25, 50 and 100 pounds, respectively (R. 3767).

The undisputed documentary evidence establishes that this finding is completely unfounded. National Lead, prior to 1933 and up to some time in 1937, employed a different method of pricing containers of lead pigments (Com. Ex. 659, R. 2545; Com. Exs. 660-662, R. 2603-13). The container differentials found by the Commission to be adopted by agreement in 1933-1934 were not placed in effect by National Lead until January 1, 1937, some 3½ years later, and it was only after National Lead announced its new schedule that the other manufacturers began to charge the same container differentials (id.).

(2) The Dry White Lead Carload Discount

The Code provided for a carload discount for Dry White Lead of not more than ¼¢ per pound (R. 2734). In December, 1933, six months prior to approval of the Code, National Lead, individually, adopted the policy of allowing a ¼¢ carload discount (R. 2186-87). Glidden began to employ the carload discount in January, 1934 (Com. Ex. 810-B), but there is no proof as to when any of the other industry members began to use such a discount.

(3) Pricing of Oxides at Differentials over Pig Lead

The Commission found that the respondents in 1933-1934 agreed to fix prices of lead oxides at certain stated differentials over the price of the chief raw material, pig lead (R. 3767, 3775). Actually the "fixed differentials" re-

ferred to in the Commission's finding had been individually adopted by National Lead in 1927, six years before the advent of NRA (Resp. Ex. 177, R. 3033-34). There is no evidence whatever that during NRA the other manufacturers agreed to adopt this differential and both prior and subsequent to 1933, National Lead used this same differential, which the Commission found came into being at the NRA meetings (id.; R. 3779).

(4) Oxide Quantity Differentials

The Commission found that the NRA meetings resulted in an agreement to charge specified quantity differentials between carload, five ton, and less than five ton shipments of lead oxides (R. 3767).

As a matter of fact, long prior to 1933 National Lead had charged a differential of $1.00 per hundredweight between carload and less than carload shipments (Resp. Ex. 177, R. 3033-34).

There was no reference in the Code discussions to quantity discounts other than the agreement to include in the Code a provision that five ton lots of oxides should carry an allowance of not more than ½¢ per pound (50¢ per hundredweight) under the seller's card or quoted price for less than carload lots. This provision became part of Schedule A of the Code, which was approved on May 24, 1934 (R. 2731).

Prior to approval of the Code, National Lead, individually, adopted the method of granting a ½¢ per pound discount for five ton shipments (Resp. Ex. 159, R. 2966). The record does not show when Eagle-Picher started to grant a similar discount. Glidden adopted this Code provision some six weeks after National Lead, and Sherwin-Williams approximately fifteen months later (Com. Exs. 810-G, 823-D).

This in substance is the evidence upon which the Commission determined that petitioners and the other pigment manufacturers, meeting "ostensibly" to draw up an NRA Code, entered into agreements to "revolutionize" their pricing practices, and thereupon put into effect a rigid system calling for uniform price zones, uniform prices, the agency method, and uniform terms and conditions of sale (R. 3750-51, 3761-67).[10]

The Issue of Price Discrimination

The Commission in effect found that where purchasers of white lead in oil were located near the zone boundaries, the payment by purchasers located in different zones of different prices constituted illegal price discrimination (R. 3793-94). The Commission purported to make findings in support of this but in actuality its findings deal with purchasers of *dry* white lead, paint manufacturers, and not purchasers of white lead in oil.[11]

The price zones for white lead in oil were as follows: par or base, plus ⅛¢, plus ¼¢, plus ⅜¢, plus ½¢, plus ¾¢, and plus 1¢ per pound (R. 3763). The premiums charged in the differential zones approximated the average

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10. The uncontradicted parol evidence was to the effect that there were no agreements entered into by industry members except agreements upon terms to be included in the Code (see Trial Ex.'s Recommended Decision, R. 3475). Commissioner Mason, in his dissent, said (R. 3831):

> "I have never observed a charge of conspiracy based on so nebulous a melange of testimony as here presented."

11. The Commission treated the dry white lead two-zone method and white lead in oil multiple zones in a single finding (R. 3793-94) and it referred to the testimony of four St. Louis paint manufacturers. It is undisputed that these paint manufacturers purchased *dry* white lead, not white lead in oil. Thus the Commission did not find that there were purchasers of white lead in oil (dealers) located in different price zones who competed with each other.

freight and cartage cost differential incurred by National Lead in shipping the product to the differential zones (Resp. Exs. 166, 169, 170, 213; R. 3007, 3011, 3025, 3137).[12]

White lead in oil was sold locally (through agents or dealers) to local painters, home owners or painting contractors. There was no finding by the Commission, and no testimony, that National Lead's agents or dealers in any one locality were in competition with agents or dealers in other localities, much less was there any finding or evidence that agents or dealers in different zones competed with each other. The only evidence on the subject clearly indicates that dealers who purchased white lead in oil from National Lead sold that product locally, for local consumption, and that there was no competition between dealers located in different zones (R. 1549, 1551-52).

In addition, the zones employed by National Lead (Com. Ex. 580, R. 2471) were drawn to take advantage of natural or physical trade barriers, such as rivers, mountains and state boundaries.

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12. For example, the following chart shows the actual cartage and freight charges for shipping white lead in oil incurred in 1941 by the Philadelphia Branch of National Lead which sold white lead in oil in the par, plus ⅛¢, and plus ⅜¢ zones (Resp. Ex. 166, R. 3007):

Territory	Average Freight & Cartage per 100 lbs.	Excess over par per 100 lbs.	Excess over par per lb.
Par	$0.197	—	—
Plus ⅛¢ (0.125¢ per lb.)	0.495	$0.298	0.3¢
Plus ⅜¢ (0.375¢ per lb.)	0.808	0.791	0.8¢

Reasons for Granting the Writ

1. The first question presented here involves the following:

Can one branch of the Government (the NRA), under an implied promise of immunity, insist that industry members undertake certain activities which another branch of the Government (the Federal Trade Commission) may use some thirteen years later as the basis for a charge of collusion and illegal agreement?

There can be no question about the fact that the charge and findings of conspiracy made by the Commission were based solely on evidence of what occurred during NRA days, when petitioners and others were trying to draft an acceptable Code. Counsel for the Commission conceded this at the hearings (R. 2269), and again in their brief before the Court of Appeals (Comm.'s Brief before Court of Appeals, pp. 57-58). The findings of the Commission also show that only NRA evidence was considered on this issue (R. 3750-51, 3761-62).

Section 5 of the National Industrial Recovery Act, 48 Stat. 198, exempted compliance with Code provisions from antitrust prosecution. It impliedly also exempted from antitrust liability activities undertaken in an effort to formulate a code. This Court in the *New Cement* case clearly indicated that such NRA evidence alone could not form the basis of a charge of conspiracy. *Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 704-05 (1948).[13]

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13. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), is not to the contrary. There the "hot oil" purchase program was undertaken entirely independently of the Code and the defendants were warned by government officials that Presidential approval must be obtained under the National Industrial Recovery Act (310 U. S. at 176-177). Here, however, the finding of conspiracy was expressly predicated upon the minutes of meetings and other documents relating to the drafting of a Code.

It would be unconscionable to apply any other rule. Moreover, the NRA activities here found to be illegal were undertaken by petitioners and the other members of the industry only at the urgent insistence of NRA officials (R. 1062-63, 1204; Resp. Ex. 50, R. 2840-43; Resp. Ex. 81, R. 2851). A finding of conspiracy on such evidence clearly "constitute[s] a fraud, or perhaps confidence game would be a more appropriate designation." (*Aetna Portland Cement Co.* v. *Federal Trade Comm'n*, 157 F. 2d 533, 549 (7th Cir. 1946), reversed on other grounds, *Trade Comm'n* v. *Cement Institute, supra.*)[14]

In all other cases where NRA evidence was deemed admissible on the issue of conspiracy, it formed only background material and in all such cases the finding of conspiracy was based on activities undertaken prior to NRA days (*New Cement* case, *supra*) or upon evidence showing actual agreements, after the demise of NRA, to continue Code practices (see, *e.g.*, *Eugene Dietzgen Co.* v. *F.T.C.*, 142 F. 2d 321 (7th Cir. 1944); *Fort Howard Paper Co.* v. *F.T.C.*, 156 F. 2d 899 (7th Cir. 1946); *Allied Paper Mills* v. *F.T.C.*, 168 F. 2d 600 (7th Cir. 1948).[15]

Thus, the record here presents an important question concerning the powers of an administrative agency which has not been, and should be, resolved by this Court.

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14. Petitioner National Lead and the other companies involved in this proceeding have consistently taken the position that the NRA evidence was inadmissible. Due objection was made to the introduction of the NRA evidence at the hearings. After the hearings an appeal was taken to the Commission on the Trial Examiner's ruling admitting the evidence relating to the NRA period (R. 3654-57) and in National Lead's Brief before the Commission (pp. 156-158) and in oral argument, the same position was taken. Similarly the point was specifically raised in the oral argument as well as in National Lead's Main Brief (pp. 49-50) and its Reply Brief (p. 5) before the Court of Appeals.

15. Here, immediately after NRA was declared unconstitutional, petitioners and the other industry members wound up their affairs

2. The second question presented, whether in any event there was substantial evidence to support the finding of conspiracy, involves fundamental principles governing the findings of administrative agencies. It also raises the question of whether the courts are to abandon their duty to review, expressly provided for in the Administrative Procedure Act, and concur in administrative determinations made without support in the evidence.

In administrative proceedings, where "power has been bestowed so freely" upon the administrative agency, the right to a fair and impartial hearing is an "inexorable safeguard" and "one of 'the rudiments of fair play' * * * assured to every litigant by the Fourteenth Amendment as a minimal requirement" (*Ohio Bell Tel Co.* v. *Comm'n.*, 301 U. S. 292, 304, 305 [1937], per Cardozo, J.).

Petitioners submit that they did not have a fair and impartial hearing. Instead, the Commission, relying on hypothetical speculation and Procrustean treatment of the evidence, found a conspiracy when, in fact, there was no supporting evidence.

We have outlined above (pp. 6-14, *supra*) the essential evidence upon which the Commission based its finding of conspiracy and it is obvious from this recital of the facts that the Commission's finding cannot stand. Certainly similarity of prices or pricing practices alone is not sufficient to establish conspiracy.[16]

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and later rejected an invitation from Washington to discuss possible informal continuation of NRA activities (Resp. Ex. 13, R. 2837-38; Resp. Ex. 92, R. 2925-26). After NRA, there were no meetings of petitioners and the other companies, no "collective" activities, and no exchange of correspondence as to prices, methods or terms of sale.

16. On the argument before the Court of Appeals counsel for the Commission conceded that "conscious parallel action" among members of the industry prior to 1933 would form no basis for a charge of conspiracy. By parity of reasoning, similarity of prices or pricing methods subsequent to 1933 could not be condemned as collusive behavior.

In our brief and appendix before the Court of Appeals, we took each essential item in the Commission's finding and showed that it was either unsupported by the evidence or contrary to the only evidence on the point at issue.

The Court of Appeals refused to consider this meticulous bill of particulars; instead it summarized the *findings* of the Commission and then held that petitioners' contentions simply raised a question of the weight of the evidence. It also suggested that the "circumstantial evidence" lent support to the Commission's findings, but the only "circumstance" referred to was the fact that petitioners and the other members of the industry all employed some sort of zone or delivered price method (227 F. 2d at 829-834).

The zone method of pricing was the principal object of the Commission's attack. The Commission and the court below, however, both pointedly ignored the fact that the zone methods here under consideration were established individually by National Lead, the largest producer with plants located throughout the country. The zones used by National Lead for white lead in oil reflected the actual average increased freight cost incurred by National Lead in delivering that product. The zone boundaries were similar to the territorial boundaries which had been employed by National Lead as far back as 1910 (*supra*, pp. 7-9, 14-15). There was no question here of any "reciprocal surrender of territorial advantage", suddenly emerging during NRA days, as in the cases cited by the Court of Appeals.[17]

Moreover, for several years after the NRA period, the delivered price methods employed by the petitioners and the other industry members differed (*supra*, p. 9).

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17. See, *e.g.*, *Fort Howard Paper Co.* v. *F.T.C.*, 156 F. 2d 899 (7th Cir. 1946). The Trial Examiner expressly found that there was no evidence of such reciprocal surrender of territorial advantage in this proceeding (R. 3493).

So far as prices for white lead in oil are concerned, we see that essentially the Commission has found a conspiracy to charge different prices (*supra*, pp. 9-10)—a curious conspiracy indeed.

The practice of pricing oxides at a differential over the pig lead price had been established individually by National Lead as far back as 1927. The carload discount for oxides was established individually by National Lead at the same time (*supra*, pp. 12-13).

Certain trade practices (such as the carload discount for dry white lead and the five ton discount for oxides) which were adopted individually by the industry members (at varying times) were specifically provided for in the NRA Code (*supra*, pp. 12, 13) and cannot be the basis for this proceeding. The fact that petitioners and the other companies obtained relief from any implied requirement contained in the Code did not render inapplicable the specific exemption from antitrust liability provided for in the National Industrial Recovery Act.[18] The Commission's contention to the contrary is purely sophistical.

In short, the evidence clearly establishes the complete absence of any agreement on zones, prices or terms and

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18. Throughout this case the Commission has attempted to make much of the fact that petitioners consulted counsel in the Fall of 1933 about the possible use, prior to Code approval, of a uniform sales contract for dry products (which was to be included in the proposed Code). The proposed uniform contract contained no provisions dealing with price but counsel felt that other provisions might be deemed indirectly to affect prices. He therefore cautioned against use of the contract by agreement. He suggested, perhaps naively, that one member adopt the contract voluntarily and that the others could follow, without agreement (Com. Ex. 522, R. 2458). Regardless of this, the point is that the advice concerned adoption of a proposed uniform sales contract—not zones, uniform prices, or the like—and the Commission expressly found that uniform sales contracts were never adopted or used generally (R. 3776). There was no warrant for the Commission to treat this insolated transaction as proof that the industry members during NRA all agreed to follow National Lead in making any changes in pricing methods.

conditions of sale. The only parallel practices involved were minor terms of sale provided for in the Code itself and these were adopted at different times by the industry members.

We are not asking this Court to weigh the evidence or to decide conflicts in the evidence. This, of course, is properly the function of the Commission as it is of any other expert administrative body. The question here, rather, is whether an administrative body may exercise its functions arbitrarily and without regard to the facts as developed in the record.

3. The third question concerns the propriety of the Commission's determination that the white lead in oil zone prices constituted illegal price discriminations. In affirming this conclusion (227 F. 2d at 835-836), the Court of Appeals overlooked the fact that there was no finding (and indeed, no evidence) that dealers located in different zones who purchased white lead in oil from National Lead were in competition with each other.[19] On the contrary, the evidence showed that white lead in oil was sold by dealers locally for local consumption (*supra*, p. 15). There was no competition between dealers in different localities, much less between those in different zones.

Section 2(a) of the Clayton Act, as amended, *supra*, requires proof that the effect of the price discrimination "may be substantially to lessen competition • • • in any line of commerce." *It is axiomatic that there can be no finding of illegal price discrimination (at the buyer's level) without initial proof that there were differing prices paid by purchasers who, in fact, competed with each other.* This is a condition precedent required both by the terms

19. In its brief before the Court of Appeals (p. 43) the Commission conceded that "the record did not develop specific evidence of injury with respect to zones employed on white lead-in-oil."

of the statute and by the authorities (see, *e.g.*, *Federal Trade Comm.* v. *Morton Salt Co.*, 334 U. S. 37, 45 (1948); *Corn Products Refining Co.* v. *Federal Trade Comm'n.*, 324 U. S. 726, 732, 738-739 (1945)).

There is thus presented the important question of whether the Federal Trade Commission may "infer" the probability of adverse competitive effects in the absence of any finding or evidence of competition between those who paid the different zone prices.

CONCLUSION

We respectfully request that a writ be issued to consider the questions set forth in this cross petition.

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Dated April 18, 1956.

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1955

No.

NATIONAL LEAD COMPANY,
Petitioner,
v.
FEDERAL TRADE COMMISSION.

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,
v.
FEDERAL TRADE COMMISSION.

THE EAGLE-PICHER COMPANY, *et al.*,
Petitioners,
v.
FEDERAL TRADE COMMISSION.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing petitions for writs of certiorari in the above-entitled causes be, and the same is hereby, extended to and including April 19th, 1956.

(SGD) SHERMAN MINTON
Associate Justice of the Supreme
Court of the United States.

Dated this 3rd
day of April, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 877

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 227 F. 2d 825.

JURISDICTION

The final decree of the Court of Appeals was entered on January 5, 1956. By order of Mr. Justice Minton, dated April 3, 1956 (Pet. 23), the time

for filing a petition for a writ of certiorari was extended to April 19, 1956, and the petition was filed on April 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission, in finding that petitioners have long been parties to a price-fixing conspiracy, improperly relied on evidence of meetings and discussions ostensibly incident to formulating an NRA code of fair competition.

2. Whether the Commission's findings of conspiracy and its findings of unlawful price discrimination in the sale of white lead-in-oil are supported by substantial evidence.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S.C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any cir-

> cuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business * * * . The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * *

Section 5 of the National Industrial Recovery Act, 48 Stat. 198, provided:

> While this title is in effect (or in the case of a license, while section 4(a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States.

Section 2 of the Clayton Act, as amended by the Robinson Patman Act of June 19, 1936, 49 Stat. 1526, 15 U.S.C. 13, provides in part:

> (a) * * * it shall be unlawful for any person engaged in commerce, * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the

benefit of such discrimination, or with customers of either of them * * *.

STATEMENT

Count I of the Commission's amended complaint charged that the petitioners and certain other companies had violated Section 5 of the Federal Trade Commission Act by combining and conspiring to restrain and suppress competition in the price and terms of sale of lead pigments (R. 63-64, 66-74). Count II charged that each petitioner had been violating Section 2(a) of the Clayton Act by discriminating in price between different purchasers of lead pigments, and that the effect of such discriminations may be substantially to lessen competition between petitioners and their competitors, to tend to create a monopoly of interstate commerce in lead pigments, and to injure, destroy and prevent competition between buyers receiving the benefit of petitioners' lower discriminatory prices and other buyers from petitioners (R. 74-78). After extensive administrative proceedings the Commission made detailed findings of fact (R. 3732-97), concluded that petitioners had violated both the foregoing statutes (R. 3797-8), and entered a cease and desist order (R. 3799-3802). Upon review, the court below upheld the Commission's findings of conspiracy and its findings of unlawful price discrimination (except in one particular not here relevant).

The facts as found by the Commission may be summarized as follows:

A code of fair competition for the lead industry, Article VII of which set forth trade practice rules for the lead pigments division of the industry, was approved pursuant to the National Recovery Act on May 24, 1934 (R. 3760). Prior to such approval various producers of lead pigments, including petitioners, had engaged in a series of meetings and discussions, beginning in July 1933, through the medium of the Lead Pigments Division of the Lead Industries Association (R. 3751-52). These meetings and discussions had resulted in understandings and agreements to do the following (R. 3761-62):

(1) To sell white lead-in-oil and other lead pigments packaged in kegs or cans of 100 pounds or less on the basis of flat delivered prices to customers within designated geographical zones, with a specified differential between the designated zones, and to sell on the same basis of flat delivered prices to customers within designated geographical zones dry white lead, red lead and litharge in drums or barrels of quantities less than 20 tons, and red lead and litharge in drums or barrels of 20 tons or more (R. 3762-66).

(2) To sell white lead-in-oil on the basis of consignment contracts for the purpose of controlling resale prices and preventing competition between the producers and their customers (R. 3767).

(3) To maintain certain specified price differentials, to allow uniform discounts and terms of sale, and to eliminate guarantees against price declines in certain sales (*ibid.*).

To the present time, petitioners have adhered to the pricing practices and to the terms and conditions of sale agreed upon in 1933 and 1934 (R. 3772, 3778), with only trifling exceptions (R. 3779, 3781, 3785-86), although prior to the 1933-1934 agreements pricing methods and terms and conditions of sale in the lead pigment industry were not uniform (R. 3749-50).

Neither the approved NRA code nor any preliminary draft made reference to use of delivered zone prices or consignment contracts in the sale of white lead-in-oil (R. 3761). Certain other provisions of the agreements and understandings entered into in 1933 and 1934 were incorporated in the approved code, but these provisions never became effective because petitioners and the other manufacturers of lead pigments obtained from the National Recovery Administration an express exemption from these requirements (R. 3761).

With respect to the charge of price discrimination, the Commission found that petitioners, through price differences resulting from their zone delivered prices and quantity and quality price differentials, had discriminated in price between different purchasers in the sale of oxides (red lead and litharge), dry white lead, and "keg products" including white lead-in-oil (R. 3787-96). For example, petitioners sold white lead-in-oil and all other "keg products" pursuant to a zone delivered price system which divided the country into twelve geographical zones, of which one was a par or base price zone, two had a premium of

12½¢ per cwt., three a premium of 25¢ per cwt., one a 37½¢ per cwt. premium, two a 50¢ per cwt. premium, two a 75¢ per cwt. premium, and one a premium of $1.00 per cwt. (R. 3762; Map, R. 3763).

Petitioners' differing zone prices were justified only where the additional freight or other transportation costs equaled or exceeded the zone premium; where this was not the case, the differing prices to competing purchasers were discriminatory (R. 3795). While evidence was offered to show that the zone differentials for white lead reflect no more than average differences in freight costs as between different zones, the fact that there is a specified variation in the *average* cost in shipping to customers in an area of a dozen or more states "does not justify the discriminations which result in particular transactions with individual customers located in border territories" (R. 3794). The use of the inter-zone differentials has had the effect of lessening competition between customers of petitioners located in different zones who are in competition in the sale of paints, storage batteries, and other products which they manufacture, and of creating a trade advantage in favor of customers who have received the lower prices in the par zones and elsewhere (R. 3795).

ARGUMENT

1. Section 5 of Title I of the National Industrial Recovery Act provided that, while Title I was in effect and for 60 days thereafter, any code "approved" and "in effect" under that title, and any

action taken during this period in compliance with such code, should be exempt from the federal anti-trust laws (*supra*, p. 3). Plainly, the conduct of petitioners which the Commission found to be illegal, a conspiracy continuing some 18 years after Title I had expired,[1] is not within this exemption. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 227, this Court, rejecting the contention that defendants' price-fixing conspiracy was immunized by Section 5, said:

> But even had [code] approval been obtained for the buying programs, that approval would not have survived the expiration in June 1935 of the Act which was the source of that approval. As we have seen, the buying program continued unabated during the balance of 1935 and far into 1936. As we said in *United States* v. *Borden Co.*, 308 U.S. 188, 202, "A conspiracy thus continued is in effect renewed during each day of its continuance." Hence, approval or knowledge and acquiescence of federal authorities prior to June 1935 could have no relevancy to respondents' activities subsequent thereto.

Petitioners do not contend that they are within any immunity given by expired Section 5, but con-

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[1] Title I expired on June 16, 1935. Section 2(c) of the National Industrial Recovery Act of June 16, 1933, provided that Title I "shall cease to exist at the expiration of two years after the date of enactment of this Act" (48 Stat. 196).

tend that it was unconscionable for the Commission to rely on evidence of what they did during the period in which they were undertaking to formulate an NRA code (Pet. 16-17). But there is in fact no basis for this complaint. Zone delivered prices and the consignment method of selling white lead-in-oil, which were major elements of petitioners' conspiracy, were never even proposed as code provisions, and, while certain relatively minor elements of the conspiracy were incorporated in the approved code, these code provisions never went into effect (*supra*, p. 6).

The courts have upheld orders issued under the Trade Commission Act in which the Commission, in finding a price-fixing conspiracy, relied on evidence of activities or conduct incident to the formulation or carrying out of an NRA code.[2] The one contrary decision which petitioners cite, *Aetna Portland Cement Co.* v. *Federal Trade Commission*, 157 F. 2d 533, 549 (C.A. 7), was reversed in this respect. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 704-705.

Moreover, petitioners are mistaken when they assert (Pet. 16) that the Commission's findings of conspiracy "were based solely on evidence of what occurred during NRA days", and that the Commis-

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[2] *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321, 328-329 (C.A. 7), certiorari denied, 323 U.S. 730; *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. 2d 899, 906 (C.A. 7), certiorari denied, 329 U.S. 795; *Allied Paper Mills* v. *Federal Trade Commission*, 168 F. 2d 600, 603, 608 (C.A. 7).

sion's counsel so conceded.[3] The Commission's findings of conspiracy were additionally based upon evidence showing the radical revision which occurred in the industry's pricing and marketing practices following the 1933 and 1934 meetings and upon evidence that petitioners subsequently adhered to and continued these practices (see R. 3771-74, 3777-84).

2. Petitioners question the sufficiency of the evidence to sustain the Commission's finding of conspiracy and its finding of unlawful price discrimination in the sale of white lead-in-oil (Pet. 18-22). This request for further review of the evidence and the inferences to be drawn from it is plainly unworthy of certiorari. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178; see also *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n.*, 273 U.S. 52, 64; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 73. And the settled principles opposing such review by this Court are not avoided by the suggestion (Pet. 18) that the Court of Appeals neglected its duty to determine whether the Commission's findings had adequate evidentiary support. Actually, the court below considered this problem at length and in detail (see 227 F. 2d at 829-834), and properly concluded that although "there is no direct evidence as to formal agreement on the part of peti-

[3] In support of the statement that counsel so conceded, petitioners cite R. 2269 and the Commission's court of appeals brief (pp. 57-58), but neither citation shows any such concession.

tioners to adopt the zone system and uniform pricing practices" (*id.* at 832), the "inference of agreement, if not necessarily impelled by [this] evidence, is certainly a reasonable one which the Commission as the trier of fact was entitled to draw therefrom" (*id.* at 833).

The evidentiary issue which petitioners raise with respect to price discrimination is limited to white lead-in-oil, although the Commission likewise found unlawful price discrimination with respect to the other lead pigments which they market (R. 3787-95, 3797). Furthermore, inadequacy of the evidence is asserted only as to the effect on competition of the price discriminations in the sale of white lead-in-oil.[4] The insubstantiality of this contention is clear. Section 2(a) of the Clayton Act prohibits price discrimination between different purchasers where the effect "may be" substantially to lessen competition or to injure competition among such purchasers. In *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 738, this Court held that the word "may" was used in order to reach those discriminations which would "probably have the defined effect" on competition, and that Section 2(a) "does not require a finding that the discriminations in price have in fact had an adverse effect on competition", the statute being designed to reach such discriminations in their in-

[4] Petitioners also assert absence of a finding that the purchasers of this product were in competition with each other (Pet. 21), but such a finding was made (R. 3793-4, 3795, 3797).

cipiency, "before the harm to competition is effected." The Court also held that findings that glucose is a principal ingredient of low priced candy, and that slight differences in the sales prices of such candy are enough to divert business from one manufacturer to another, provided adequate basis for the Commission's inference that there is a reasonable probability that the effect of price discriminations in the sale of glucose may be substantially to lessen competition among purchasers of glucose. *Id.* at 739.

In the present case there were findings parallel to those held to be sufficient in the *Corn Products* case (R. 3793-96), and there was evidence to support these findings. As the court below stated, the evidence tended to show that there is keen competition between dealers in paint products, including white lead-in-oil, and that "there is more than a reasonable possibility" that competition would cross the arbitrary zoning lines established by petitioners, which lines bisect ten states and in some instances place a single city or metropolitan area in a preferred zone status over the remainder of the state in which it is located (227 F. 2d at 835). The court noted that St. Louis is in a par zone as contrasted with the 12½¢ higher zone in the rest of the state of Missouri; that San Francisco, Oakland, and Berkley are par territories while the remainder of California is in a 25¢ zone; and that the area immediately encompassing Omaha and Lincoln, Nebraska, and Atchison, Leavenworth, and Kansas

City, Kansas, are in a 12½¢ zone, while the remaining area of their respective states is in the 25¢ zone (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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